86-752

No.

Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LEONARD T. DLUGOSZ

Petitioner Pro se

vs.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL DISTRICT

LEONARD T. DLUGOSZ

4 Minden Drive
Orchard Park, NY 14127
(716) 825-5291

QUESTIONS PRESENTED

Whether the Court of Appeals decision, affirming Merit Systems Protection Board's denial to review my Petition, because it did not meet criteria of 5 CFR 1201:115, has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower Court, as to call for an excercise of this Court's power of supervision.

List of all parties to the proceeding in the Court whose judgement is sought to be reviewed

U. S. Court of Appeals for the Federal Circuit, Merit Systems Protection Board Regional - Boston, Merit Systems Protection Board, Office of Personnel Management.

TABLE OF CONTENTS

PAGE

Opinions Below..... 2

Jurisdiction..... 2

Statutes Involved..... 2

Statement of the Case..... 3

Reasons For Granting the Writ.....11

Conclusion.....17

Proof of Service.....18

Appendix

Court of Appeals Decision.....APP.22

MSPB Order.....APP.20

MSPB - Reg. - Boston Decision..APP.14

MSPB - Reg. - Boston Order.....APP.11

Letter of Inquiry.....APP.23

Response to Letter of Inquiry..APP.27

TABLE OF AUTHORITIES

Cases:

No precedent Cases

Statutes:

Civil Service Reform Act
of 1978.....

Staggers Act of 1980
Title - 5.....

Railroad Retirement Act of 1974
45 USC 5 231 (o).....

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LEONARD T. DLUGOSZ

Petitioner Pro se

vs.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL DISTRICT

Leonard T. Dlugosz, hereby petitions that a Writ of Certiorari be issued to review the Judgement and Opinion of the United States Court of Appeals for the Federal Circuit entered on August 12, 1986.

OPINIONS BELOW

The judgement order of the United States Court of Appeals for the Federal District, issued without opinion, is set forth in the Appendix at pages APP.22.

The Order of the Merit Systems Protection Board is printed in the Appendix at page 20.

JURISDICTION

The Federal Circuit's Judgement was entered on August 12, 1986.

The jurisdiction of this Court is invoked under 5 - USC § 7703

STATUTES INVOLVED

The statute involved herein is under the Civil Service Reform Act of 1978, under Title 5 of the Code of Federal Regulation 5- CFR - 1201: 115, which provides in part: "The Board may grant a petition for review when it is established that:

(a) New and material evidence is available that despite due diligence, was not available when record was closed, or

(b) the decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Staggers Act of 1980 - Title 5 Labor protection provided: No adverse job status upon return to Railroad, a monthly displacement allowance and severance pay.

Above benefits were taken from me when (ICC) relieved me of my Leave of Absence 5 years after my entry into Federal Service.

Railroad Retirement Act of 1974 - 45 USC 5 231 (o) Current Connection. Annuity benefits were also lost when recourse to return to railroad was lost because of forced surrender of Leave of Absence.

STATEMENT OF THE CASE

My case has developed over a 3 year period in which I have contested the OFFICE OF PERSONNEL MANAGEMENT'S (OPM) determination of my retirement benefits as an employee of

the Interstate Commerce Commission, (ICC). The case has developed from an initial determination from the Merit Systems Protection Board (MSPB) and progressed up to and including the U. S. Court of Appeals for the Federal Circuit.

Prior to hiring into Federal service (ICC) in 1973, I worked for the Buffalo Creek Railroad (Conrail) - 1941 - 1973. My pension contribution (Rail) at the time of transfer into Federal service (ICC) was 9.8% - paid to the United States Treasury. After starting my Federal service, I began paying 7% for pension benefits, to the United States Treasury.

Having successfully competed in a competitive Civil Service Job Announcement For Railroad Service Agent in 1972, I was called for an interview with Agency officials in Boston, Massachusetts. It is noted, that Candidates from various Federal agencies likewise competed and were also accepted for this position. The Job Announcement qualifi-

cations included special skills obtained, either by railroad service or government service. Prior to accepting this position, the Agency assured me that there would be no loss of pension benefits as a result of my transfer into Civil Service.

Five years later, I was ordered by the Agency to sever all accrued benefits and Leave of Absence with the railroad.

Prior to retiring from government service in 1985, I requested an estimate of my pension from the (OPM). Their determination of my pension benefits, as an employee of the (ICC), included a formula, which assessed my Retirement Credit Value, at the transfer point into Federal service in 1973 at 0%. However, at the point of transfer into Federal service, I was already paying a 9.8% contributory rate for rail pension and commenced to pay a 7% contributory rate into Federal pension. Other candidates, hired into (ICC) from other Federal agencies, retained their Retirement Credit Value at 7%. This action contradicted

the principles which form the jurisdictional basis of the Merit Systems Protection Board as enumerated in the Civil Service Reform Act of 1978.

Applicable Principles which provide in Part:

eg. "All employees and applicants should be treated equally and fairly, and their privacy and Constitutional rights respected." (See Appeal Rights and Procedures - U. S. Merit Systems Protection Board - U. S. Government Bulletin 1982.)

eg. "Equal pay should be provided for work of equal value taking into consideration rates paid by private sector employees." (See U. S. Merit Systems Protection Board - U. S. Government Bulletin 1982.)

When applying for my pension (January 1, 1985) I also applied for a DEPOSIT (Form 2803) which would provide me an opportunity to pay for any difference of monies paid by these other Federal employees into the Federal Pension Fund and what I paid into the Rail Pension Fund, during my tenure with the Railroad. (1941 - 1973).

This request was denied and I was

forced to apply for two (2) separate lesser pensions. Both these pensions, Rail and Civil, yielded less than either of the two total pensions for the same number of years. This, despite the fact that I paid more into the two pensions than either of the two system pensions would require.

Because my appeal to the OPM was denied, I began a process of appeals from Regional MSPB to the U.S. Court of Appeals, as described in the following Board actions.

11-27-84 Decision of Regional MSPB - Boston
(Denied)
P.O. used outdated 1937 law.
APP 1

03-29-85 Petition for Review - MSPB -
Washington
(Board vacated P.O. Boston
Decision and ordered reconsid-
eration.)
APP 7

06-12-85 Petition for Reconsideration to Regional MSPB. The Presiding Officer (P.O.) Markuns issued an Order to Settle and offered his assistance with settlement negotiations. Attempting to settle, I contacted the respondent's (OPM) General Counsel Daniel Levinson and Counsel Mr. Lieberman and both informed me that "it was up to the MSPB Board to decide service credit."

APP 11

08-12-85 Regional MSPB Decision. The Presiding Officer (P.O.) Markuns then directed that further review of the case may be the jurisdiction of the Federal Courts, and then changed his position without any further offer of assistance to pursue the settlement order.

At this point, I contacted MSPB General Counsel Evangeline Swift who recommended that the merits of the case are within the jurisdiction of MSPB and that a Petition for Review should be directed to the MSPB (Board).

APP. 14

12-20-85 Petition for Review
MSPB denied due to 5 - CFR - 1201:115. The Board never justified P.O. Markuns' decision to pursue the matter in the Federal Court, nor was the settlement Order addressed.

APP. 20

08-12-86 U. S. Court of Appeals Denied.
The Court affirmed MSPB's denial due to 5 - CFR - 1201:115. No test of the Case was ever made.

APP. 22

09-03-36 Inquiry made to MSPB General Counsel's office for information relative to the case.
I was informed that the new chairman of the MSPB was Daniel R. Levinson, the former General Counsel of Respondent OPM and the same person I talked with for an arrangement to meet in accordance with Regional MSPB - P.O. Markuns' Order to Settle, dated 06-12-85.
APP. 23

09-30-86 MSPB response (APP. 27) (Negative)

REASONS FOR GRANTING THE WRIT

This case is important because it is without precedence, leaving Petitioner powerless to use record opinions, citations or constitutional provisions to support the fact that an injustice was perpetrated, not by an Agency's violation of the two pertinent Acts, (Civil Service Retirement Act and Railroad Retirement Act), but by the result of the Agency's unauthorized discriminatory action, which brought about a loss of my pension. The Respondent's position is simply that, since there is no precedence and it does not exist in the language of the two Acts, there is no room for recourse.

I submit that the following discovery is <u>new</u> evidence, is relevant, has the scope and materiality of the particular information that was not present in the consideration of the Appeals Court Decision and unknown to the Petitioner, until after the Court's Denial on August 12, 1986.

In its decision to affirm the MSPB Denial due to 5 - CFR 1201:115, the Federal Circuit relied on factors not visible in my case, but since, have become material to the consideration of fair judgement and needs to to be further examined and addressed by this Court. The new evidence was, that on or about August 18, 1986, I called the Duty Officer of the MSPB Special Counsel Office for information relating to the case. I was informed that the new chairman of the MSPB was non-other than same, Respondent Daniel R. Levinson, General Counsel of the OPM, whom I talked with in the attempt to secure a meeting to settle, in accordance with Regional MSPB - P.O. Markuns Order to Settle. This relevation led me to suspect that while trying to negotiate with Respondent's General Counsel, Mr. Levinson, I was also addressing the incumbent Chairman Levinson of the MSPB. It was Respondent Levinson who responded that "it was for the Board to decide Service Credit", and it was Retiring MSPB Chairman Ellingwood who

denied my Petition for Review A/C 5 - CFR 1201:115. It is my belief that a relationship existed which directly or indirectly involved Mr. Levinson in the ultimate decision making process which resulted in the denial of my Petition for Review.

The following supports that belief.

A. RE. Regional MSPB - P.O. Order to Settle.

Upon P.O. Markuns' direction, I talked with Respondent's General Counsels - Messrs. Levinson and Lieberman in the attempt to set up a meeting. Both Counsels responded that "It was a matter for the Boards to decide the issue of service credit." I relayed this to P.O. Markuns.

QUESTIONS

1. Did P.O. Markuns abort Order on the merit of my reply or did he also talk to Mr. Levinson in the attempt to settle?

2. Was P.O. Markuns also aware that Respondent Levinson was also the incumbent Chairman of the MSPB?

3. Also, during this Action, did the Retiring MSPB Chairman Ellingwood discuss the merits of my case with Respondent's Counsel Levinson, his successor, before rejecting my Petition for Review?

4. Did the retiring MSPB Chairman discuss with Respondent's Counsel Levinson his successor, the extent of the efforts necessary to settle the order?

5. Did the retiring MSPB Chairman, discuss with incumbent MSPB Chairman my petition's allegations, that Respondent's

Counsel violated - Exparte Communications.

6. Did retiring MSPB Chairman discuss with Respondent's General Counsel Levinson, my petition's allegations that, his arguments regarding Deposit claims were in opposition to official views of his Director, Dr. Devine?

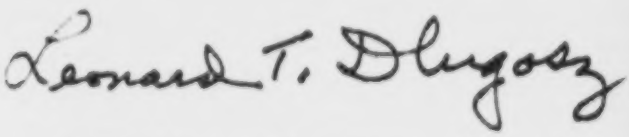
Finally, when I received P.O. Markuns' second Decision which followed the unfulfilled Order to Settle, I contacted MSPB General Counsel Evangeline Swift to clarify this. She said that Regional MSPB P.O. Markuns decision to pursue Federal Court jurisdiction was not procedure, but that my next action should be the MSPB Petition for Review. This Petition was then denied and subsequently affirmed by the Federal Circuit.

The ultimate result, successfully prevented the test of my case. A test would have shown that, Respondent's only effort was to prove that "combined credit" was not inherent in the two ACTS. They did not address the essence of my claim that it was Respondent's action in the bridging of my Retirement Credit value, at the time of transfer from Rail (9.8%) to Civil (7%), that reduced it to 0%. This action was not authorized or inherent in the two acts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petitioner for a Writ of Certiorari to review the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,



Leonard T. Dlugosz, (Pro se)
4 Minden Drive
Orchard Park, NY 14127
(716) 825-5291

PROOF OF SERVICE

LEONARD T. DLUGOSZ, on oath deposes and states that on the 6th day of November, 1986, three copies of the Petition for a Writ of Certiorari were served by first class mail; postage prepaid, on Solicitor General, Department of Justice, Washington, D. C. 20530.

Leonard T. Dlugosz

LEONARD T. DLUGOSZ
4 Minden Drive
Orchard Park, NY 14127
(716) 825-5291

Subscribed and sworn to before me this 6th day of November, 1986.

Robert V. Heftka

Notary Public

ROBERT V. HEFTKA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1987

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

LEONARD T. DLUGOSZ	) INITIAL
	) DECISION NO.
	) NY08318410525
v.	)
	)
OFFICE OF PERSONNEL MANAGEMENT	) DATE: 11-27-84

INTRODUCTION

By letter dated August 31, 1984, Mr. Leonard T. Dlugosz, (appellant) sought to appeal the August 16, 1984 reconsideration decision of the Office of Personnel Management (OPM) determining that his service with the Buffalo Creek Railroad (from 1941 to 1973) was not creditable for Civil Service Retirement purposes.

JURISDICTION

Section 8347(d)(1) of Title 5, U.S. Code, gives a right of appeal to an individual whose rights or interests are affected by an administrative action or order issued by OPM. The August 16, 1984 reconsideration decision is such an action or order taken by OPM pursuant to its authority under 5 U.S.C. 8337(d). Therefore, appellant has the right

of appeal to the Board. 5 U.S.C. 7701(a) 5 C.F.R. 831.110.

ANALYSIS AND FINDINGS

By its reconsideration decision, OPM determined that appellant's service with the Buffalo Creek Railroad did not qualify for civil service retirement credit. In his appeal to the Board, appellant sought a reversal of OPM's reconsideration decision. He requested to have his application for deposit of moneys paid into the Railroad Retirement System by him transferred to the Civil Service Retirement System. He further argued that this should be done so he could have a single pension instead of two smaller ones. He noted that other non-federal service was creditable under Section 8332, that the agency he worked for (Interstate Commerce Commission) required all ex-railroad employees to sever all ties with the railroad, that the dual pensions cause a disparity that deprives

him of what he might get if the pensions were combined; and lastly that because the ICC required railroad experience and hence that experience should be creditable.

The pertinent statutory provisions relating to creditable service under the Civil Service Retirement Act are contained at 5 U.S.C. 2105 (a) which defines employee. Appellant has not shown that while he worked for a railroad he qualified as a federal employee. Because appellant has not shown he was a federal employee, he cannot be entitled to credit for his non-federal work. Appellant's arguments that his pension will be less, or that he was required to sever all contact with the railroad, etcetera, are of no probative value. Appellant can have no rights to a federal pension as a non-federal employee by statute.

In summary, I find by a preponderance of the evidence that appellant is not entitled to credit for the time he worked with the Buffalo

Creek Railroad.

DECISION

OPM's reconsideration decision to deny appellant credit for the time he worked at Buffalo Creek Railroad is AFFIRMED.

NOTICE

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on January 1, 1985 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal may file a petition for review of this decision with the Merit Systems Protection Board. All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The Board may grant a petition for review after providing

an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

The petition for review must be filed no later than January 1, 1985 with:

Office of Clerk of the Board
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D. C. 20419

One original and two copies of the petition must be filed with the Office of Clerk of the Board.

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals

for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

/s/ Marsha Mearns Sayler
Marsha Mearns Sayler
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEONARD T. DLUGOSZ	)	DOCKET NUMBER
	)	NY08318410525
v.	)	
OFFICE OF PERSONNEL MANAGEMENT	)	Date: 03/29/85

OPINION AND ORDER

Appellant has petitioned for review of an initial decision issued November 27, 1984, by the Board's Boston Regional Office, which affirmed the agency's reconsideration decision. The petition for review is GRANTED.

OPM determined that appellant's service with the Buffalo Creek Railroad was not creditable for Civil Service Retirement purposes. In reaching this conclusion, OPM considered the applicability of the provision of the Railroad Retirement Act of 1937 defining "a current connection with the railroad industry." See 45 U.S.C. §228a(o). However, the statutory provision on which appellant appears to rest his claim is contained in the Railroad Retirement Act

of 1974[1/] since that Act included for the first time certain federal employees in the definition of "a current connection with the railroad industry".

It does not appear that OPM or the Regional Office considered the applicability of this legislation to appellant's claim.

Accordingly, the initial decision is hereby VACATED, OPM's reconsideration decision is REVERSED, and OPM is ORDERED to reconsider its initial denial of appellant's application[2/] in light of the Railroad Retirement Act of 1974. Cf. Bradley v. Office of Personnel Management, 23 M.S.P.R. 475, 476 (1984).

1/ See 45 U.S.C.S. §231 (o). For a discussion of "current connection" in a different but informative context, see United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), reh'g denied, 450 U.S. 960 (1981).

2/ The record shows that on December 13, 1983, while still employed with the Interstate Commerce Commission, appellant filed an Application to Make Deposit or Redeposit for periods of railroad service for which Civil Service Retirement deductions were not withheld. The record does not show that OPM specifically ruled on this application. However, on May 9, 1984, in response to an ICC request,

OPM denied service credit for appellant's railroad service on the ground that such service was not performed as a federal employee. Although noting that OPM never responded to his application, appellant nevertheless filed a request for reconsideration of the May 9 determination. It is not clear whether the May 9 response to ICC was also intended as a response to and denial of appellant's application to make deposit. Nor is it clear that the May 9 response constitutes an adequate response to appellant's application, since it characterizes the issue as one of service credit. Insofar as we can determine from the record, including appellant's petition for review, appellant appears to contend that the Railroad Retirement Act gives him entitlement to have his railroad service treated as if it is creditable for Civil Service Retirement purposes so the OPM is required to compute a single annuity covering both his railroad and ICC service, providing appellant makes the necessary deposits to cover his railroad service. If OPM determines either that it has not responded to appellant's application or that the May 9 response to appellant's application, it shall provide appellant an initial decision on his application within twenty(20) days from the date of this order.

Appellant is hereby advised that if OPM has not issued its decision on reconsideration of his appeal within 60 days of the date of this Order, he may file a request for enforcement of the Order in the Board's New York Regional Office pursuant to 5 C.F.R. §1201.181(a). This is the final Order of the Merit Systems Protection Board in this appeal.
5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE
150 CAUSEWAY STREET, ROOM 1122
BOSTON, MASSACHUSETTS 02114

LEONARD T. DLUGOSZ)
)
v.) Case No.
) NY08318510447
OFFICE OF PERSONNEL MANAGEMENT)

ORDER

The agency response in this case has been received.

Because neither party has requested a hearing within the time limits set forth in this office's previous orders, a hearing will not be held. Accordingly, the following alternative procedures will be used to complete processing of this case.

SETTLEMENT ASSISTANCE

The Board stands ready to assist the parties in reaching settlement whenever possible. The presiding official is available to facilitate settlement discussions at the joint request of the parties. Assistance available from the presiding official includes, but is not limited to, advice regarding the impact of settlement on the

appeal and advice regarding the efficacy of any proposed settlement. If the parties believe that the participation of the presiding official would not be appropriate but that Board assistance would still be helpful, the presiding official will arrange, at the parties' request, for the Regional Director or his designee to be made available to the parties to facilitate settlement discussions. Settlement assistance may be obtained by requesting it in writing or by calling the presiding official at (617) 223-2556.

OPPORTUNITY FOR FINAL SUBMISSIONS

Both parties are hereby provided an opportunity to submit any evidence and/or argument as a final submission. This submission must be filed, i.e., postmarked or personally delivered, within twenty (20) calendar days of the date of this order. The record in this case will close on that date unless new issues are raised or information presented which requires(s) an opportunity for rebuttal. No evidence or argument received after the closing date will be accepted

unless accompanied by a statement establishing that it is new and material evidence which was not available before the record closed. The Board requires all documents to be filed on 8 1/2" x 11" paper to comply with the requirements of the U.S. Courts.

/s/ John F. Markuns
John F. Markuns
Presiding Official

June 12, 1985
Date

App. 14

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

LEONARD T. DLUGOSZ, appellant, v. OFFICE OF PERSONNEL MANAGEMENT agency.	Case No. NY08318510447 Date: 8/12/85 JOHN F. MARKUNS Presiding Official

DECISION

By opinion and order dated March 29, 1985, the Board ordered the agency to reconsider its initial denial of appellant's request that it treat his railroad service as if it is creditable for civil service retirement purposes to compute a single annuity covering both railroad and Interstate Commerce Commission (ICC) service, providing he makes the necessary deposits to cover his railroad service. On May 1, 1985 the agency issued this reconsideration decision which denied his request. Appellant has petitioned for appeal from this decision. For the reasons set forth below, the agency's reconsideration decision is AFFIRMED.

FINDINGS AND CONCLUSIONS

The burden of proof is on appellant to establish his entitlement to a combined civil service annuity which credits his prior railroad service. See Little v. Office of Personnel Management, 762 F.2d 962 (Fed. Cir. 1985). Appellant first contends that the Railroad Retirement Act of 1974, as amended in 1981, entitles him to this combined annuity. He claims the protection of the "current connection" provisions of this Act. See 45 U.S.C. 231b.

The cited statutory provision addresses employee entitlements to benefits under the Railroad Retirement Act and the Social Security Act. Appellant points to no specific statutory provisions which addresses his entitlement to a combined annuity under the Civil Service Retirement Act (C.S.R.A.). In addition, neither 5 U.S.C. 8332 nor any other subsection of the C.S.R.A. describes railroad service as creditable or authorizes the agency to pay a combined annuity where an employee has creditable service under both systems.

Absent express statutory language authorizing the agency to credit railroad service and to issue a combined annuity, I find appellant is not entitled to receive these benefits. Appellant further contends that his request should be granted because he is entitled to equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution of the United States. Administrative Amendment to Constitution of the United States. Administrative agencies lack the authority to determine the constitutionalty of statutes. Brown v. Department of Transportation, MSPB Dkt. No. AT075281F1788 (July 7, 1983). Thus, appellant's argument is not one for OPM or the Board to address, but is one which should be directed to the federal courts. See, e.g., United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), reh'g denied, 450 U.S. 960 (1981). Accordingly, for all the foregoing reasons, I sustain OPM's decision to deny appellant's request.

REVIEW RIGHTS

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on September 16, 1985 unless a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and .117 (1985). Any party to this appeal may file a petition for review of this initial decision with the Merit Systems Protection Board. All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The Board may grant a petition for review when the criteria set out in 5 C.F.R. 1201.115 are met.

The petition for review must be filed no later than September 16, 1985 with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D.C. 20419

One original and one copy of the petition must be filed with the Clerk of the Board. (It is

not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information see 50 Fed. Reg. 28895. Appellant may seek judicial review of the Board's decision, by filing a petition for review with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

5 U.S.C. 7703 (1982). The court's jurisdiction in this case, however, is limited to determining whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination." Lindahl v. Office of Personnel Management, ___ U.S. ____, 105 S.Ct. 1620, 1633 (1985). The petition for review must be received by the

court no later than thirty (30) days after the Board's decision becomes final.

For the Board:

/s/ John F. Markuns by WC
John F. Markuns
Presiding Official

App. 20

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LEONARD T. DLUGOSZ, appellant, v. OFFICE OF PERSONNEL MANAGEMENT, agency.	DOCKET NUMBER NY08318510447 DATE 12/20/85

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on August 12, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later that thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUI

LEONARD T. DLUGOSZ,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

Appeal No. 86-996

DECIDED: August 12, 1986

Before RICH, BALDWIN, and BISSELL, Circuit Judges.

PER CURIAM.

DECISION

The December 23, 1985, final decision of the Merit Systems Protection Board, No. NY08318510447, sustaining the Office of Personnel Management's decision denying petitioner's request that it treat petitioner's private railroad service from 1941-1973 as creditable for civil service retirement purposes, is affirmed on the basis of the presiding official's opinion. The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 5 USC 7703(c).

Leonard T. Dlugosz
4 Minden Drive
Orchard Park, NY 14127
September 8, 1986
Telephone: 716 825-5291

Mr. Daniel R. Levinson
U.S. Merit Systems Protection Board
Washington, D.C. 20419

RE:
Leonard T. Dlugosz
v.
Office of Personnel Management
MSPB Docket No. 8318510447

Dear Mr. Levinson:

I am appealing to you for assistance in giving me an opportunity to discuss with your office, a crucial problem relating to the status of my case.

My case has developed over a 3 year period in which I have contested OPM's determination of my retirement benefits as an employee of the ICC. The case has developed from an initial determination from MSPB and progressed up to and including the U.S. Court of Appeals. Due to the fact that I am a 65 year old retiree and have been unable to afford legal counsel, I have had to handle this entire endeavor on a "Pro se" basis.

The following is a brief summary of the various levels in which I have pleaded my case from its inception.

DATE

08-31-84 Appeal to Regional MSPB- Boston (Denied) P.O. used outdated 1937 law.

03-29-85 Petition for Review- MSPB- Washington (Board vacated P.O. Boston Decision and ordered reconsideration.)

06-12-85 Petition for Reconsideration to MSPB- Boston (Order to Settle)
P.O.'s offer of assistance was not fulfilled and settlement negotiations were never commenced. (I was willing to settle.)

08-12-85 P.O. Boston Decision (P.O. directed continuance to be jurisdiction of Federal Court).
P.O. changed position without any offer of assistance to pursue prior settlement order.

12-20-85 Petition for Review- MSPB- Washington (Denied A/C 1201:115).
Board never justified P.O. Markum's decision to pursue matter in Federal Court, nor was Settlement Order addressed.

03-17-86 Petition for Review- U.S. Court of Appeals Federal District- (Denied) Affirmed MSPB- Washington Denial A/C 1201:115. Court merely "rubber-stamped" MSPB- Washington denial. No test of case was made.

Current: Now pending submission of Writ of Certiorari to U.S. Supreme Court.

As a result of my recent conversation with the following Agencies: EEOC Commission - Buffalo, N.Y., FLRA Counsel - New York City,N.Y., Special Counsel office MSPB - Washington, I now feel compelled to seek your assistance in clarifying several critical points which developed in the processing of my case through the MSPB.

(1) No justification was given me for the abandonment of the Order to Settle issued by P.O. Markum- Boston.

(2) Failure to address issues on discrimination and equal employment opportunities as enumerated in the Civil Service Reform Act of 1978 which forms the jurisdictional basis of the MSPB.

e.g. "All employees and applicants should be treated equally and fairly, and their privacy and Constitutional rights respected." (See Appeal Rights and Procedures - U.S. Merit Systems Protection Board - U.S. Government Bulletin 1982.)

e.g. "Equal pay should be provided for work of equal value taking into consideration rates paid by private sector employees", (See - U.S. Merit Systems Protection Board - U.S. Government Bulletin 1982.)

(3) Authority for the use of Exparte Communication which is a violation of 1201:102.

(4) Referral to Federal Court Jurisdiction by P.O. Markum, when the merits of the case could have been resolved within the MSPB jurisdiction, as recommended by MSPB Counsel Evangeline Swift.

(5) Disregard for my rights as they exist under 1201:155 and 1201:158.

I am appealing to you for a Consideration to return to the fulfillment of MSPB - Boston - P.O.'s Order to Settle.

I would welcome the opportunity to discuss the allegations made in this correspondence and would welcome any assistance you could give me regarding the issues raised.

For your information, the issues in my case are not unique as you can see, the U.S. Senate and House Committee have already researched this area and have found enough justification and validity to bring this matter to a joint resolution contained in the Congressional Record herein attached.

Thank you for your anticipated cooperation.

Respectfully,

/s/ Leonard T. Dlugosz
Leonard T. Dlugosz

U.S. MERIT SYSTEMS PROTECTION BOARD

September 30, 1986

Mr. Leonard T. Dlugosz
4 Minden Drive
Orchard Park, NY 14127

Dear Mr. Dlugosz:

This is in response to your letter dated September 8, 1986, addressed to Chairman Daniel R. Levinson.

The Board issued a decision in your case on December 20, 1985, and that decision was appealed to the U.S. Court of Appeals for the Federal Circuit on January 23, 1986.

You state in your letter to Chairman Levinson that the Court of Appeals issued a decision on your case on March 17, 1986, and that a submission of a "writ of certiorari to the U.S. Supreme Court" is now pending.

The administrative process in your case concluded with finality of the Board's decision issued on December 20, 1985. It is inappropriate for the Board to comment

on the substantive issues in a case on which it has issued a decision.

Sincerely,

/s/ Michael H. Hoxie
Michael H. Hoxie,
Director
Information Services Div.